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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 324

TIME, INCORPORATED, *Petitioner,*

v.

FRANK PAPE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINION BELOW

The opinion of the Court of Appeals (R. 61-68), printed in Appendix A hereto, is reported in —— F.2d ——.

JURISDICTION

The judgment of the Court of Appeals (R. 69) was entered on April 25, 1963 (Appendix B hereto). A Petition for Rehearing and/or Clarification was denied by the Court of Appeals on June 14, 1963 (R. 75; Appendix C hereto). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PRELIMINARY STATEMENT

This petition does not seek the usual relief; the Court is not asked to grant plenary review on the merits of the proceedings below. Instead, petitioner is simply and solely requesting that the Court grant certiorari and remand the case to the Seventh Circuit for vitally needed clarification of an ambiguous judicial ruling that may in fact have been a critical determination of First Amendment rights.[1]

QUESTION PRESENTED

A news article in *Time* Magazine discussed and quoted a portion of the 1961 Report of the U. S. Commission on Civil Rights that summarized charges of misconduct made by a Negro family in a Civil Rights Act suit against respondent Pape, of the Chicago Police. Pape brought this libel suit against *Time* alleging that its article accused him of in fact violating the Negro family's civil rights while the Commission's Report had not done so; the District Court dismissed the action, and Pape appealed to the Seventh Circuit. While that appeal was pending, trial of the Civil Rights Act suit ended in a final adjudication of Pape's liability to the Negro family, and this final adjudication was promptly called to the Seventh Circuit's attention by a motion to dismiss Pape's appeal.

The Seventh Circuit reversed the dismissal of Pape's libel complaint and remanded "for further proceedings." In a single cryptic paragraph, the Seventh Circuit took "judicial notice" of the final adjudication of Pape's Civil Rights liability but denied the motion to dismiss the appeal without stating any reason. Even after specific request in a rehearing petition, the Seventh Circuit refused to

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[1] 28 U.S.C. §2106 provides: "The Supreme Court . . . may affirm, modify, vacate, set aside, or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances."

indicate whether or not its rejection of the motion to dismiss was a ruling that the Civil Rights judgment was without admissibility or relevancy to establish *Time's* constitutionally secured defense of truth; the parties and the trial court are thus in a state of conjecture as to whether the Seventh Circuit intended to rule upon the merits concerning this evidence of truth or to relegate the question entirely to the trial court for initial determination.

The sole question presented is whether the fair and orderly administration of justice and the declared public policy in favor of expediting litigation require the Seventh Circuit to declare if it has ruled upon the admissibility or relevancy of the final judgment against Pape as that judgment relates to *Time's* First Amendment right to prove the truth; or instead, ruled that the trial court should first make such determination.

STATEMENT OF THE CASE

This case is an outgrowth of *Monroe* v. *Pape*, 365 U.S. 167 (1961). This Court there reversed a decision of the Seventh Circuit that held that a suit could not be maintained under the Civil Rights Act[2] against the respondent Pape, a Chicago Police Captain, and several of his subordinate officers, for violation of the federal constitutional rights of the Monroes. The Monroes, a Negro family residing in Chicago, averred that respondent Pape and his subordinates, acting without a warrant, had broken into the Monroe apartment at 5:45 a.m., routed the family from bed at gunpoint, ransacked the entire apartment, physically abused Mr. and Mrs. Monroe and the children, took Mr. Monroe to the police station and detained him there 10 hours for interrogation without permitting him to call his family or an attorney and without taking him before a magistrate, and finally released him without filing

[2] R.S. § 1979, 42 U.S.C. § 1983.

any charges. The Seventh Circuit sustained,[3] but this Court rejected,[4] the officers' defense that the conduct of which the Monroes complained was not redressable under the Civil Rights Act because it was outside the scope of their police authority and prohibited by state law.

After this Court's reversal, *Monroe* v. *Pape* proceeded to trial, and verdict and judgment resulted in favor of the Monroes. (R. 22-24.) No appeal was taken and the judgment became final on February 23, 1963. (Docket No. 59-C-329, D.C.N.D. Ill.)

Meanwhile, in the period between this Court's reversal and the trial of the Monroes' suit, the 1961 Report of the U. S. Commission on Civil Rights was issued.[5] Volume 5 of the Report, entitled *Justice*, contained a chapter on "Unlawful Police Violence" which narrated several episodes of reported police misconduct or brutality, including the events described in the complaint in *Monroe* v. *Pape*. (R. 62-64.) The chapter was prefaced with a statement that the Commission had not conclusively determined whether the reported allegations of police misconduct were correct, but that they were "supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations."[6]

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[3] 272 F. 2d 365, 366.

[4] 365 U.S. 167, 187.

[5] The Commission was created by the Civil Rights Act of 1957, 42 U.S.C. § 1975, to study civil rights problems and report to the President and Congress. As this Court noted in *Hannah* v. *Larche*, 363 U.S. 420, 441 (1960), the purpose of the Commission's existence "is to find facts which may subsequently be used as the basis for legislative or executive action."

[6] 5 1961 United States Commission on Civil Rights Report, p. 5. (R. 62.)

Respondent Pape brought this libel action against petitioner on the basis of a news article in *Time* Magazine which reported upon the above-described portion of the Commission's Report. (R. 61-63) At one point, the *Time* article quoted the Report's language describing the acts of Pape and his fellow officers against the Monroe family as related in the latter's complaint.[7] (R. 62-64.) Pape alleged that the *Time* article charged him with in fact violating the Monroes' civil rights.

Time's motion to dismiss the complaint on grounds of qualified privilege and fair comment was granted by the District Court, ——F. Supp. —— (N.D. Ill. 1963; R. 62-63), and Pape appealed to the Seventh Circuit.

While Pape's appeal was pending, trial on the merits of *Monroe* v. *Pape* was concluded, resulting in verdict and judgment holding Pape liable to the Monroes under the Civil Rights Act in the sum of $8,000. (R. 22-24.). No appeal was taken and after the judgment became final by lapse of time, petitioner promptly apprised the Court of Appeals of that final judgment by a motion to dismiss Pape's appeal for mootness. (R. 3-5.)

The Seventh Circuit, with one judge dissenting, construed Pape's libel complaint as stating an actionable claim, and reversed and remanded to the District Court "for further proceedings." (R. 61-69.) In one brusque paragraph at the end of its opinion, the Court of Appeals took "judicial notice" of the final judgment against Pape in the *Monroe* case and rejected out of hand *Time*'s suggestion that this judgment had rendered the libel case moot. That paragraph states:

> "This court takes judicial notice that, upon trial of *Monroe* v. *Pape* after remand by the Supreme Court,

[7] The Commission's Report had borrowed this quoted language from Mr. Justice Frankfurter's summary of the complaint in his dissenting opinion in *Monroe* v. *Pape*, 365 U.S. at 203. (R. 63.)

a verdict and judgment were recently entered for Monroe. After the District Court denied defendants' post-trial motions, except for a reduction of the verdict, Time made a motion in this court to dismiss the appeal for mootness. That motion was taken with the case and is hereby denied." (R. 66.)

In a Petition for Rehearing and/or Clarification (R. 70-74), petitioner requested that the Court of Appeals clarify that part of its opinion dealing with the final judgment in *Monroe* v. *Pape*. Petitioner pointed out that the *Monroe* judgment *was* final, and that on remand a controversy would undoubtedly occur over its admissibility, relevancy, and probative effect in establishing petitioner's constitutional defense of truth. Petitioner also urged that the Court of Appeals' cursory and cryptic paragraph judicially noticing and spurning the *Monroe* judgment would inevitably provoke a further controversy over whether the court intended to rule upon the admissibility, relevancy or probative effect of the judgment as it relates to the constitutional defense of truth, or whether it intended to leave those questions wholly to the initial determination of the trial court.

The Court of Appeals denied the petition without opinion, again by a 2-1 vote. (R. 75.)

REASONS FOR GRANTING THE WRIT

Petitioner seeks certiorari for the single and narrow purpose of requesting the Court to remand the case to the Court of Appeals with an instruction to clarify its judgment by specifically indicating whether it intended to rule upon the admissibility, relevancy, or probative effect of the final adjudication in *Monroe* v. *Pape*, or to relegate those questions entirely to the trial court for initial determination.

The relief sought may be unusual, but its urgency and appropriateness are distinctly apparent in the extraordinary circumstances here presented. The Court of Appeals

not only failed to furnish necessary guidance to the trial court on the inevitable and critical question of what effect should be accorded the *Monroe* judgment; but the court also, by its perfunctory notice of that judgment and unqualified rejection of *Time*'s mootness suggestion, spawned still a greater source of inevitable controversy and confusion in the trial court as to whether it thereby intended to reject or downgrade the admissibility or relevancy of the *Monroe* judgment. The Court of Appeals, by this bizarre obfuscation of its position on a vitally important matter that "is fundamental to the further conduct of the case,"[8] has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."[9]

Petitioner does not seek clarification out of academic curiosity; its concern is intensely practical. The court below has held that the *Time* article of which Pape complains may be construed as charging Pape with violating the Monroes' civil rights during an arrest; *Time* clearly has the right to prove that its article was true, and hence protected by freedom of speech and press under the First and Fourteenth Amendments. We can conceive of no better or more relevant evidence of the literal truth of the *Time* article than the final judgment entered in the *Monroe* suit, after full trial, finding that Pape in fact violated the Monroes' civil rights. If that final judgment cannot be construed as res judicata with respect to *Time*'s defense of truth, or at least held to be fully admissible and relevant evidence to prove the truth, *Time*'s defensive position will be seriously, perhaps fatally, impaired.

The importance of the relief sought transcends the private interests of the litigants. News coverage of current events in the civil rights area has recently met with a

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[8] *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

[9] Rule 19(1)(b), Revised Rules of this Court.

number of retaliatory libel actions brought by officials of state and local governments;[10] the procedures followed and sanctioned in the adjudication of these cases, especially with regard to proof of the facts, are of vital concern to the news media of this country and the public they serve. This Court has repeatedly stressed that because of the preferred position which freedom of speech and press enjoys in our constitutional order, any method by which that freedom is sought to be curtailed must be subjected to close analysis and critical judgment. *E.g., Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441-42 (1957); *Near* v. *Minnesota*, 283 U.S. 697 (1931). Moreover, since only considerations of the greatest urgency can justify restrictions on speech, the "procedures by which the facts of the case are adjudicated are of special importance. . . ." *Speiser* v. *Randall*, 357 U.S. 513, 521 (1958). The delicate task of separating protected from unprotected speech clearly "calls for more sensitive tools," *id.* at 525, than the Seventh Circuit has provided in this case.[11]

As matters now stand, the murky and negative treatment accorded the *Monroe* judgment by the Seventh Circuit

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[10] In addition to the instant case, for example, a number of civil libel actions have been brought against the *New York Times* in Alabama by state and local officials on the basis of articles or advertisements in the *Times* dealing with the Southern Negro civil rights movement. See *New York Times Co.* v. *Sullivan*, 144 So. 2d 25 (Ala. 1962), *cert. granted*, 371 U.S. 946 (1963), in which a judgment against the *Times* of $500,000 was affirmed by the Alabama Supreme Court. See also *Parks* v. *New York Times Co.*, 195 F. Supp. 919 (M.D. Ala. 1962), *rev'd*, 308 F. 2d 474 (5th Cir. 1962); *New York Times Co.* v. *Connor*, 291 F. 2d 492 (5th Cir. 1961), *rev'd*, 310 F. 2d 133 (5th Cir. 1962). Damages exceeding $3,000,000 have been claimed in these cases. Alabama officials have also brought several libel actions against the Columbia Broadcasting System based on television coverage of civil rights conflicts in the South. See cases cited in Petition for Certiorari, p. 19 (footnote), *New York Times Co.* v. *Sullivan*, *supra*.

[11] Cf. *Marcus* v. *Search Warrant*, 367 U.S. 717, 731 (1961).

casts grave doubt upon its admissibility and relevancy to prove *Time*'s constitutional defense of truth. This doubt is magnified by the court's mute rejection of *Time*'s rehearing request to make clear whether it meant to leave the admissibility and relevancy of the *Monroe* judgement entirely to the trial court's initial determination. If such was the court's intention, *one simple sentence to that effect would suffice*. If something else was meant, justice demands disclosure of that meaning now; the trial court and litigants should not be left to grope in darkness and risk the pitfalls and delay of piecemeal trial and review. Only the Court of Appeals can clarify what it meant to hold; only this Court, through exercise of its supervisory power, can require that the necessary clarification be made in the interest of fair procedure and expedient disposition of litigation.[12]

The simplicity of the issue and of the relief sought by petitioner makes full briefing and oral argument quite unnecessary. Cf. *State Tax Comm'n of Arizona* v. *Murray Co. of Texas*, 364 U.S. 289 (1960); *Chicago* v. *Willett Co.*, 341 U.S. 913 (1951); *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962). Summary remand of the case for clarification of a narrow but critically important phase of the Seventh Circuit's judgment and opinion would not require this Court to inquire into the merits of the holding below or to pass upon any matters ordinarily left to the circuits in diversity cases. On the other hand, such remand would assure essential guidance to the trial court on a question of First Amendment rights that is crucial to the further conduct of the case, would avoid the intolerable delay and injustice of piecemeal trial and review, and would consequently "prevent extraordinary in-

[12] See Kaufman, *The Philosophy of Effective Judicial Supervision over Litigation*, 29 F.R.D. 207 (1962); Olney, *An Analysis of Docket Congestion in the United States District Courts*, 29 F.R.D. 217 (1962); Note, *The Supervisory Power of the Federal Courts*, 76 Harv. L. Rev. 1656 (1963).

convenience and embarrassment in the conduct of the cause." *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 584-85 (1952); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945). Moreover, such remand would foster the salutary purpose of deterring repetitions of the practice which was followed below in all cases, particularly those involving "preferred position" rights under the First Amendment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the case should then forthwith be remanded to the Seventh Circuit for clarification of that part of its opinion pertaining to the final judgment in *Monroe* v. *Pape*.

Respectfully submitted,

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APPENDIX "A"

Opinion of the Court of Appeals For the Seventh Circuit

FRANK PAPE, *Plaintiff-Appellant*;

v.

TIME, INCORPORATED, *Defendant-Appellee*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

April 25, 1963

Before SCHNACKENBERG, KNOCH, and KILEY, *Circuit Judges*.

KILEY, *Circuit Judge*. This is a diversity libel suit charging that Time, Incorporated, publisher of a national weekly news magazine, defamed plaintiff Pape in an article based on *Justice*, volume 5 of the 1961 report of the United States Commission on Civil Rights.[1] The District Court dismissed the complaint on Time's motion, and plaintiff has appealed.

[1] Created by the Civil Rights Act of 1957, 42 U.S.C. § 1975, to study civil rights problems and report to the President and Congress. The Supreme Court described the Commission's statutory duties in *Hannah* v. *Larche*, 363 U.S. 420, at 441 (1960):

> • • • its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

Time's motion admitted, for purposes of this appeal, the well pleaded facts: Plaintiff, at the time of the alleged libel, was Director of Security for Chicago Thoroughbred Enterprises, Incorporated, which operated race tracks in metropolitan Chicago. He was on leave from his position as a captain of Chicago Police. He enjoyed a good reputation.

In its issue of November 24, 1961, Time published the alleged defamatory matter in reporting the filing of *Justice* by the Commission. The material subject of suit appears under "Part VII. Equal Justice Under Law." In Part VII are two chapters: "1. Introduction; and 2. Unlawful Police Violence."

Chapter 2, "Unlawful Police Violence," briefly describes eleven typical cases of police brutality. The Commission states: "The allegations of misconduct are supported in several cases by criminal convictions * * * or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations. In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appeared substantial enough to justify discussion in the study."[2]

The Time article, captioned "Civil Rights—Dawdling on the Corner,"[3] was based on that part of Chapter 2 of the

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[2] 5 U. S. Comm on Civil Rights Report 5 (1961).

[3] The caption, "dawdling on the corner" is taken from a separate statement filed in the Report by Reverend Theodore M. Hesburgh, C.S.C., President of the University of Notre Dame, and a Member of the Commission. In part, Commissioner Hesburgh stated:

> Personally, I don't care if the United States gets the first man on the moon, if while this is happening on a crash basis, we dawdle along here on our corner of the earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hypocrites to all the world.

5 U. S. Comm. on Civil Rights Report 168 (1961).

Commission Report entitled "Patterns of Police Brutality." Time noted the publishing of *Justice* by the Commission and went on to report incidents in Georgia and Chicago, two of the eleven incidents revealed in the Commission Report. The Chicago incident involved the arrest by Pape and other Chicago police officers of a Negro family named Monroe on Chicago's west side.[4]

This District Court's opinion, sustaining Time's motion to dismiss, was that the article was a fair and accurate account of the Commission's Report, a matter of public interest and legitimate subject of comment of an honest purpose; and that the article did not exceed the bounds of fair comment and was not actionable.

The question is whether the District Court erred in finding, under Illinois law, that the complaint failed to state a claim upon which relief could be granted. The subordinate, vital question is whether Time's report of what the Commission said about the Pape incident is fair comment.

Time's article introduced the reader to *Justice* as carrying "a chilling text about police brutality" and that "it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the Commission." The reader is told, in a footnote, who the noted educators are.[5] Time's second paragraph begins, "The bluntly frank

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[4] Based on the alleged wrongful conduct of Pape and his fellow officers in making that arrest, Monroe brought a civil rights suit which, on appeal, *Monroe v. Pape*, 365 U. S. 167 (1961), was remanded for trial to the Northern District of Illinois, Eastern Division.

[5] Members of the United States Commission on Civil Rights: Chairman Dr. John A. Hannah, President of Michigan State University; Vice Chairman Robert G. Storey, head of Southwestern Legal Center and former Dean of Southern Methodist University Law School; Reverend Theodore M. Hesburgh, President of the University of Notre Dame; Dr. Robert S. Rankin, Chairman of the Political Science Department, Duke University; Erwin N. Griswold, Dean of the Harvard University Law School; and Spottswood W. Robinson III, Dean of the Howard University Law School.

report tells of a police officer, referred to only as 'Y', in Dawson, Ga." This and the third paragraphs tell of the Georgia incident through quotations, detailing the police brutality, from the victim, Brazier, and his wife, and quotations from the Report. The third paragraph concludes in Time's statement, "Brazier died five days later, and 'Y' was never punished." In the fourth paragraph Time reported the Pape incident.

The Pape incident is set forth in the Commission Report in this way:[6]

> *Search, seizure, and violence: Chicago, 1958.*—The Supreme Court of the United States decided the case of *Monroe* v. *Pape* on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Acts on the basis of a complaint which alleged that:[7]
>
> . . . [O]n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping

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[6] 5 U. S. Comm. on Civil Rights Report 20, 21 (1961).

[7] The Commission set forth the facts alleged in the complaint by quoting from Justice Frankfurter's dissent in *Monroe* v. *Pape*, 365 U. S. 167, 202-259 (1961).

mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him.

Time began its report of the Commission's statement of the Pape incident this way: "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder." It continued: "The police, says *Justice*, broke through two doors * * *." Time then quoted the rest of the statement of the Commission verbatim. The Time paragraph concludes: "The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment."

We agree with the District Court that Time was not absolutely privileged in writing the article. The absolute privilege of the Commission did not protect Time. It had a "qualified or conditional privilege," *Cresson v. Dispatch Printing Co.*, 291 Fed. 632 (D. C. Minn. 1923), to comment fairly upon, and criticize fairly, the Commission report. Under Illinois law, governing here, Time can be liable if it goes beyond that limit and "states as a fact that which is not true * * *." *Cook v. East Shore Newspapers Inc.*, 327 Ill. App. 559, 580, 64 N. E. 2d 751, 761 (1945). *Belt v. Tribune Co.*, 6 Ill. App. 2d 489, 128 N. E. 2d 638 (1955). "It is fundamental that fair comment and criticism cannot be predicated on an unfair or false statement of facts." *Belt v. Tribune Co.*, 6 Ill. App. 2d 489, at 494, 128 N.E. 2d 638, at 640. The rule applies to writing about crime. *Cook*

v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 585, 64 N. E. 2d 751, 763 (1945).

The test of the fairness of the Time article is the meaning which readers of common and reasonable understanding would ascribe to the language used, *Belt v. Tribune Co.* 6 Ill. App. 2d 489, 493, 128 N. E. 2d 638, 640 (1955). And as Justice John C. Lewe said in *Dilling v. Illinois Publishing & Printing Co.*, 340 Ill. App. 303, 306, 91 N. E. 2d 635, 637 (1950), "* * * a person of ordinary intelligence should read a newspaper article * * * with ordinarily intelligent discrimination."

The question before us involves not what the Commission Report of 307 pages says of Pape, but only what the Time article says about the Report. The reader is set by the introduction, conditioned by the Georgia incident and its stark ending; and prepared to read how the Chicago police treated Monroe's family in the very early morning while "ostensibly" investigating a murder. Then the reader is told that *Justice* "says" Pape and others *did* what the Report merely said Monroe's complaint *alleged* Pape and others had done. The closing paragraph, relied on by Time to immunize it from liability, says the officers were not punished—as the article earlier stated "Y", in the Georgia incident, was not punished.

We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go too far, *Cook* v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 580, 582, 64 N. E. 2d 751, 761, 763 (1945), quoting Judge O. W. Holmes, Jr. A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission Report. It is our opinion that a jury could read the Time article as stating that the Report said Pape and his fellow officers *did* what the Commission Report merely said the *Monroe*

complaint *alleged they did*. The typical newspaper reader could take from the article the impression that Pape and the other officers were not really investigating a murder when they mistreated the Monroe family, that the noted educators in *Justice* found that the Monroes were mistreated by Pape and the other officers, and that they were not being punished but ought to be.

It is true that the Commission had the facts alleged in the *Monroe* complaint, from which it quoted, investigated sufficiently to justify their use for the Commission's purposes in the Report. But the Commission was careful to state, at the beginning of its Report: "In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements."[5] The Time article, however, does not say that. The article says that the Commission Report "stands as a grave indictment, since its facts were carefully investigated." But the Report does not say that. The "carefully investigated" statement in Time adds weight to its quotation, substituting the words "says *Justice*" for the words of the Report, "* * * a complaint which alleged that."

Time argues that the "innocent construction" rule requires this court to read the article "innocently," citing *John* v. *Tribune Co.*, 24 Ill. 2d 437, 442, 181 N. E. 2d 105, 108 (1962). We are required by the rule in that case to give the Time article its "natural and obvious meaning." To read the article innocently, Time asks us to read the article as *not* saying what it does say. It says that the Civil Rights Commission said that Pape had, among other things, assaulted the Monroe family and violated their civil rights. In fact, the Commission said that a complaint in a civil action *alleged* that Pape had done those things.

The complaint states a claim upon which relief can be granted. The District Court erred in ordering it dismissed.

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[5] 5 U. S. Comm. on Civil Rights Report 5 (1961).

This court takes judicial notice that, upon trial of *Monroe* v. *Pape* after remand by the Supreme Court, a verdict and judgment was recently entered for Monroe. After the District Court denied defendants' post-trial motions, except for a reduction of the verdict, Time made a motion in this court to dismiss the appeal for mootness. That motion was taken with the case and is hereby denied.

The judgment is REVERSED, and the cause REMANDED for further proceedings.

SCHNACKENBERG, *Circuit Judge*, dissenting:

The foregoing opinion's importance lies in its alarming invasion of the right of the press to publish its interpretation of the factual situation presented in an official report issued by a commission created by the Congress of the United States. 42 U. S. C. A. § 1975.

From the Commission's report entitled "Justice", it is clear that the Commission had a basis for the statements which it made in its report.[1] It referred, at page 105, to "a comprehensive review of available evidence", while, at page 5, it disclaimed making any conclusive determination as to whether the complainants or the police officers were correct in their statements, this being "a function of a court". But it expressly stated that "allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eyewitnesses, or by *staff*[2] field investigations". That case not having come to trial in court at that time, the Commission, for convenience, expressly quoted the charges of the Monroe complaint as set forth by Mr. Justice Frankfurter in his dissent, 365 U. S. 167, at 203-204.

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[1] Said act required the filing of a report. See § 1975e (b).

[2] Italics supplied for emphasis. § 1975d (a) provided that there should be a full-time *staff* director for the Commission.

Justice dealt with numerous other cases where police brutality charges had been made, discussed violence by others than police, considered state and local remedies and the status and rights of the American Indian.

At 112, Justice made recommendations to Congress as to the advisability of remedial legislation. The report was duly transmitted to Congress.

The report known as Justice was privileged and nonactionable in a libel suit. A published article which fairly comments upon a governmental report is likewise privileged and nonactionable, under Illinois law. The publication in the case at bar is a fair comment upon the issuance of a governmental report and its contents. Plaintiff cannot force publishers, under threat of libel, to conceal the fact that the Commission pointed to his alleged conduct as a basis for its conclusions and recommendations to Congress.

I would affirm.

APPENDIX "B"

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Thursday, April 25, 1963.

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

No. 13819

FRANK PAPE, *Plaintiff-Appellant*,

v.

TIME, INCORPORATED, *Defendant-Appellee*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and that this cause be, and it is hereby REMANDED to the said District Court for further proceedings, in accordance with the opinion of this Court filed this day.

It is further ordered that the motion filed herein by defendant-appellee to dismiss the appeal for mootness be, and the same is hereby denied.

APPENDIX "C"

Order Denying Petition For Rehearing and/or Clarification

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Friday, June 14, 1963

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

No. 13819

FRANK FAPE, *Plaintiff-Appellant*,

v.

TIME, INCORPORATED, *Defendant-Appellee*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

IT IS HEREBY ORDERED that the petition of defendant-appellee for rehearing and/or clarification, filed in this appeal, be and the same is hereby, denied.

(Judge Schnackenberg voted to grant the said petition).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 324

TIME, INCORPORATED, *Petitioner*,

v.

FRANK PAPE, *Respondent*.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ROGER Q. WHITE,
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Chicago 4, Illinois,
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Frank Pape

LUIS KUTNER,
JOHN M. KAVENY,
Of Counsel.

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Statement of the Case

While the *Time* article quoted in part the language of the Report of the U.S. Commission on Civil Rights [admittedly privileged], the Court of Appeals said that by the rewording the Report and deleting words, *Time* took the risk that it might go too far.

> "A jury could find that Time went beyond the limits of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission Report. It is our opinion that a jury could read the Time ar-

ticle as stating that the Report said Pape and his fellow officers *did* what the Commission Report merely said the *Monroe* complaint *alleged they did.*" [emphasis the Court's] [R. 65]

In his complaint, Pape did not limit himself to alleging that Time's article charged him with violating Monroe's civil rights, as implied on page 5 of *Time's* petition. Pape charged that the articles stated that he had been guilty of criminal assault, intimidation, and brutality, in his treatment of the James Monroe family.

ARGUMENT

Reasons Why the Writ Should Not Be Granted

I

The question of the relevance of the judgment in Monroe v. Pape was not properly raised in the Court of Appeals, and this Court will not pass upon an issue not properly raised below.

Until its petition for rehearing, petitioner, neither by motion or otherwise, raised the question it now presses on this Court, i.e., that the Court Appeals should rule on the admissibility and relevance of the judgment entered in *Monroe* v. *Pape* as a part of petitioner's defense in the trial of this case.

Subsequent to oral argument in the Court of Appeals, petitioner moved to dismiss this cause as moot because of the judgment rendered in *Monroe* v. *Pape* [R. 3-5]. In its "Suggestions in Support of Its Motion," petitioner, at paragraph 3, states that the effect of the judgment of *Monroe* v. *Pape* is to find Pape guilty of violating Monroe's civil rights, which proves its article substantially true.

Therefore, the Court was asked to dismiss the appeal as moot. Nowhere in its motion does petitioner ask the Court to consider the *Monroe* v. *Pape* judgment for any purpose except to dismiss this cause for mootness.

Pape filed a copy of the original *Monroe* v. *Pape* complaint with his objection to petitioner's motion [R. 33]. The allegations of this complaint were quoted in *5 Justice* and by petitioner in the article in question. Respondent pointed out to the Court of Appeals the significant differences between this original complaint and the second amended complaint on which judgment was ultimately rendered. Petitioner filed a reply to this [R. 57] in which it was claimed that the "substantial truth" of the article had been proved by the verdict in *Monroe* v. *Pape*, and the Court Appeals should therefore dismiss this case as moot.

In its petition for rehearing, petitioner, for the first time, asked the Court to rule on the relevance of the judgment in *Monroe* v. *Pape* [R. 71]. This Court has held that it will not grant a petition for writ of certiorari where the question raised in the petition was not timely and properly raised below. *Wolf* v. *North Carolina*, 364 U.S. 177 [1960]; *Ellis* v. *Dixon*, 349 U.S. 458 [1955]; *Edelman* v. *California*, 344 U.S. 357 [1953]; *Beauharnais* v. *Illinois*, 343 U.S. 259 [1952]. See also: *Beck* v. *Washington*, 369 U.S. 541 [1962]; *Polizzi* v. *Cowles Magazines, Inc.*, 345 U.S. 663 [1953]; *United States* v. *Fleischman*, 339 U.S. 349 [1950].

II

The judgment in Monroe v. Pape is not relevant to the issues raised in these proceedings

In what petitioner calls "a single cryptic paragraph" on page 2 of its petition, the Court of Appeals denied the motion to dismiss respondent's appeal on the ground of moot-

ness. The Court of Appeals then had before it both the *Time* article which is the basis of this lawsuit, and the second amended complaint in *Monroe* v. *Pape*, in which judgment had just been entered against Pape. The Court of Appeals opinion specificially states [R. 66] that it was taking judicial notice of the verdict and judgment in *Monroe* v. *Pape*. It then denied petitioner's motion to dismiss this cause for mootness. There is nothing cryptic about it. The Court of Appeals obviously understood that the charges set forth in the *Time* article were so different from the allegations in the second amended complaint in *Monroe* v. Pape that the verdict and judgment in that case were irrelevant to the claimed libel and could not render this cause moot.

What petitioner really urged in its petition for rehearing and urges here, is collateral estoppel. If successful, its whole defense is the record of the jury's verdict in *Monroe* v. *Pape*.

In *Yates* v. *United States*, 354 U.S. 298 [1957], the Court discussed the doctrine of collateral estoppel and, at page 336, says:

> "That doctrine makes conclusive in subsequent proceedings only determinations of fact and mixed fact and law that were essential to the decision."

Thereafter, on page 338, the same opinion, the Court says:

> "The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts of an issue in the subsequent proceedings. So far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative. *The Evergreen* v. *Naman*, 142 F. 2d

927; Restatement, Judgments, sec. 68, comment *p*. *Cf Bordonaro Brothers Theatres, Inc.* v. *Paramount Pictures, Inc.*, 203 F. 2d 676, 678."

In both the original and amended complaints in *Monroe* v. *Pape*, jurisdiction of the Federal Court was based upon 42 U.S.A., sec. 1983, which provides that "every person who, under color of any statute . . . of any state . . . subjects . . ", any citizen of the United States . . . within the jurisdiction thereof [to] the deprivation of any rights . . . secured by the Constitution and laws shall be liable to the party injured in an action . . . or other proper proceedings for redress."

The verdict in *Monroe* v. *Pape*, if applicable to these proceedings at all under the doctrine of collateral estoppel, is of value only in its holding that Pape violated Monroe's rights reserved to him under 42 U.S.C.A. 1983. The verdict in no way found the evidentiary or 'mediate' facts which petitioner presses upon the Court in these proceedings e.g., that Pape was guilty of assault, intimidation and brutality. It is submitted that the Court of Appeals, having before it both the original complaint and the second amended complaint, ruled on the relevance of the judgment in *Monroe* v. *Pape* in line with the foregoing authorities.

Petitioner argues that to avoid undue restrictions upon freedom of the press, the Court must adopt the so-called "innocent construction" rule and find that the "gist" or "sting" of the *Time* article was merely that Pape had violated Monroe's civil rights, rather than having committed specific acts of police brutality. The Court of Appeals disposed of this argument as follows:

> "Time argues that the 'innocent construction' rule requires this court to read the article 'innocently,' citing *John* v. *Tribune Co.*, 24 Ill. 2d 437, 442, 181 N.E. 2d 105,

108 [1962]. We are required by the rule in that case to give the Time article its 'natural and obvious meaning.' To read the article innocently, Time asks us to read the article as *not* saying what it does say. It says that the Civil Rights Commission said that Pape had, among other things assaulted the Monroe family and violated their civil rights. In fact, the Commission said that a complaint in a civil action *alleged* that Pape had done those things." [emphasis the Court's] [R. 66]

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Frank Pape

LUIS KUTNER,
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Of Counsel.

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ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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IN THE

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ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

We believe respondent's brief is a most persuasive demonstration of the critical need to clarify the Seventh Circuit's decision. Respondent's efforts to decipher what that opinion holds with regard to *Monroe* v. *Pape* are a preview of the controversy that must occur in the trial court unless the Seventh Circuit is required by this Court to clarify its holding. We believe it is pointless to join in respondent's speculations as to what was decided below; only the Court of Appeals can provide that answer.

Respondent's suggestion that the question presented in our petition was not seasonably raised below is without substance. The problem was first raised by the opinion

of the Seventh Circuit itself: *Time* availed itself of the only opportunity it had to request clarification before coming to this Court, *i.e.*, in the petition for rehearing.

Conclusion

We respectfully request that the Court grant certiorari and forthwith remand the case to the Court of Appeals for clarification of that portion of its opinion dealing with the judgment in *Monroe* v. *Pape*.

Respectfully submitted,

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